



LEGAL BRIEFS

From the Fort Knox Legal Assistance Office

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

FACTS: The Uniformed Services Employment and Reemployment Rights Act (USERRA) became fully effective on December 12, 1994. The purpose of the USERRA (38 U.S.C. 4301-4333), like the Veterans' Reemployment Rights (VRR) law it replaces, is to provide those who leave a civilian job for service in the uniformed services the right to return to the job, with accrued seniority, provided they meet the law's eligibility requirements. The USERRA applies to voluntary as well as involuntary service and in peacetime as well as wartime. The law applies to all civilian employers, including the Federal Government, state and local governments, and private employers, regardless of size.

The Veterans' Employment and Training Service (VETS), U.S. Department of Labor, is responsible for enforcing the USERRA. You can call 1-800-442-2VET to obtain the address and telephone number of the VETS office closest to you. Under the USERRA, VETS will assist Federal employees claiming reemployment rights, as well as employees of State and local governments, and private employers.

The Department of Defense's National Committee for Employer Support of the Guard and Reserve (NCESGR) explains the law to reservists and their employers, but is not an enforcement agency. NCESGR operates an awards program for especially cooperative employers. You can call NCESGR at 1-800-336-4590.

Q. What are the requirements for protection under the USERRA?

A. There are five criteria: (a) You must have held a civilian job; (b) You must have given notice to the employer that you were leaving the job for service in the uniform services; (c) The period of service must not have exceeded five years; (d) You must have been released from service under "honorable conditions;" (e) You must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

Q. Do my rights depend upon the type of military training or service that I am to perform (e.g., active duty versus active duty for training)?

A. No, not any longer. Under the VRR law, the rules were different based on the type of training or service. Under the USERRA, all types are treated as "service in the uniformed services" and the rules depend upon the duration of the service.

LEAVING THE JOB -- NOTICE REQUIREMENT

Q. Does my civilian job have to be an "other than temporary" job?

A. No, not necessarily. Under the USERRA, even persons holding "temporary" jobs can have reemployment rights unless "the employment... is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period" [38 U.S.C. 4312(d)(1)(C)]

Q. When is prior notice to my civilian employer required? How is such notice to be given?

A. Under the USERRA, it is necessary that the person who is to perform service in the uniformed services or an appropriate officer of the uniformed service in which the service is to be performed give advanced written or verbal notice to the employer [38 U.S.C. 4312(a)(1)]. The notice requirement applies to all categories of training or service. No notice is required if the giving of such notice is precluded by military necessity. It is reasonable to expect that situations where notice is not required will be rare.

Q. Do I need to request a leave of absence when military training or duty will conflict with civilian employment?

A. No. Under the USERRA you are only required to give notice. As a matter of courtesy to your employer, you may wish to phrase your notice in terms of a request for permission to be absent from work for military training or service.

Q. How much advanced notice is required?

A. The law does not specify how much advanced notice is required, but our advice would be that you give your employer as much advance notice as possible.

Q. Must the notice be in writing?

A. No. Our advice would be that you give written notice if possible, because written notice tends to avoid misunderstandings and proof problems. It would be prudent for you to retain a copy of your written notice, in case a question arises upon your return as to whether you provided advance notice.

Q. Can my Commanding Officer or someone else give notice on my behalf?

A. Yes. The law provides that notice may be given by “an appropriate officer of the uniformed service in which the service is to be performed.” Our advice is that you should give personal notice to your employer and not depend upon someone else to do this for you.

LIMIT ON DURATION OF SERVICE

Q. How is the five-year limit computed?

A. Only the service in the uniformed services that you have performed “with respect to the employer relationship for which [you] seek reemployment” counts toward the five-year limit [38 U.S.C. 4312(c)]. In other words, military service that you performed before you began working for your current employer is irrelevant.

Q. Is the limit cumulative?

A. Yes, so long as you stay employed by the same civilian employer. When you start a new job with a new employer, you receive a fresh five-year entitlement.

Q. Do all kinds of military training or service count toward the cumulative five-year limit?

A. No. The cumulative five-year limit does not count certain kinds of duty or training. Most periodic and special Reserve and National Guard training does not count [38 U.S.C. 4312(c)(3)]. There are several exceptions to the five-year limit, and some are not as clear as they might be. If you are in any danger of exceeding the five-year limit with your current employer, it is strongly recommended that you seek advice as to how much of the limit you have already expended and whether a proposed tour of training or service will count toward the limit.

Q. What about reserve training and other categories of training or service that fit into the exceptions for the five-year limit? Is there any limit to the duration of such service?

A. No. The USERRA expressly provides that the timing, frequency, duration, or nature of service shall not be a basis for denying rights and benefits unless the service exceeds the permissible limits under the rules of the five-year limit.

Q. Is it acceptable for my employer to require me to take vacation or leave for military training or service?

A. No. It is unlawful for the employer to require you to use annual leave or vacation for military training or service. It is your option to use your paid vacation or leave to have your civilian pay continue uninterrupted, but this is your option, not your employer's. When you

have exhausted your paid leave, the USERRA gives you the right to unpaid military leave.

CHARACTER OF SERVICE

Q. What kind of discharge from military service will disqualify me from reemployment rights?

A. You will not have reemployment rights if you receive one of the following: (a) A dishonorable discharge or bad conduct discharge [awarded by court-martial to an enlisted member for serious misconduct]; (b) A dismissal as provided by Section 116(a) of Title 10 [awarded by court martial to a commissioned officer for serious misconduct]; (c) A separation from service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned; (d) Dropping you from the rolls of the service pursuant to Section 116(b) of Title 10.

REPORTING BACK TO WORK OR APPLYING FOR REEMPLOYMENT

Q. After military training or service, how long do I have to report back to work or apply for reemployment?

A. It is dependent upon the period of training or service. For periods of up to 30 consecutive days, you must report back to work “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation. ...from the place of that [military] service to [your] residence” [38 U.S.C. 4312(e)(1)(A)(i)]. For example, if your training is over at 1630 on Sunday and it takes five hours for safe transportation from the place of training to your residence, you are not required to report to work for a shift that starts at 0200 on Monday, because you have not had at least eight hours of rest.

If reporting back within this deadline is “impossible or unreasonable” through no fault of yours (e.g., you are involved in an automobile accident), you must report back as soon as possible after the expiration of the eight-hour period.

After a period of training or service of 31-180 days, you must submit an application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within that 14 day period is impossible or unreasonable through no fault of yourself, you must submit the application by the first full calendar day when submission of such application becomes possible.

After a period of training or service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service.

Any of these deadlines can be extended by up to two years if you are hospitalized or convalescing for a service-connected injury or illness.

Q. What if I am late in reporting back to work or applying for reemployment, although it was not impossible or unreasonable for me to report back or apply within the deadline?

A. In that case, you do not automatically forfeit your right to reemployment, but you will be “subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work” [38 U.S.C. 4312(e)(3)].

Q. What does it mean to “submit an application for reemployment?”

A. You must make it clear to the employer that you are a former employee returning from service in the uniformed services. You are not an applicant for new employment.

Following a period of training or service of 31 days or more, and upon request by the employer, you must provide documentation (e.g., a DD-214, an endorsed copy of your orders, or a letter from your Commanding Officer) to establish that your application for reemployment is timely, that you have not exceeded the five-year service limitation, and that you are not disqualified for reemployment for having received an “other than honorable” discharge. If the required documentation does not yet exist or is not readily available to you, the employer cannot use the lack of such documentation to delay or defeat your right to reemployment. In such a situation, the employer must reemploy you promptly while awaiting such documentation.

Q. Must the application be in writing?

A. No, but a written application would be a good idea. Written applications tend to preclude misunderstandings and facilitate proof.

ENTITLEMENTS DURING SERVICE

Q. Does the USERRA give me the right to benefits from my civilian employer during my military training or service?

A. Yes. The USERRA gives you the right to elect continued health insurance coverage, through your civilian job, during training or service. For periods of up to 30 days of training or service, the employer can only require you to pay the employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge you up to 102% of the entire premium, including the part normally paid by the employer.

It would probably be a good idea for you to make this election for short tours (up to 30 days) because your right to use the military health care system for your

spouse and dependents only applies if you are under orders for 31 days or more of service.

If and to the extent that your employer offers non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your service or training. If the employer’s treatment of persons on leaves of absences varies according to the kind of leave (jury leave, educational leave, etc.), the comparison should be made with the employer’s most generous form of leave.

ENTITLEMENTS UPON RETURN FROM SERVICE

Q. If I meet the USERRA’s eligibility criteria, to what am I entitled upon my application for reemployment?

A. You have four basic entitlements: (a) Prompt reinstatement; (b) Accrued seniority, as if you had been continuously employed; (c) Training or retraining and other accommodations; (d) Special protection against discharge, except for cause.

Q. What do you mean by “prompt reinstatement?”

A. 38 U.S.C. 4313(a) provides that the returning servicemember or Reservist must be “promptly reemployed.” The law does not define prompt, but this should generally be a matter of days, not weeks or months. Persons returning from periods of up to 30 days of training or service must report back to work instead of submitting applications for reemployment. Such persons are entitled to be put back on the payroll immediately upon reporting back to work.

Q. Am I entitled to the exact job I left?

A. The USERRA provided that you are entitled to the exact job you left if your period of service did not exceed 90 days, provided that you are still qualified for that job. If your period of service was for 91 days or more, the employer has the option to reemploy you in another position of “like seniority, status, and pay.”

Q. What kind of training or retraining and other accommodations am I entitled to?

A. If you have been gone from your civilian job for months or years, you may find many changes when you come back. You must be qualified to do the job in order to have reemployment rights, but the USERRA requires the employer make “reasonable efforts” to qualify you [38 U.S.C. 4313(a)(2)(B)].

Q. What is the period of special protection against discharge, except for cause?

A. If your period of service was for 181 days or more, the period of special protection is one year. If your period of service was 31-180 days, the period of special protection is 180 days. If your period of service was less than 31 days, you have no special protection, but you are still protected by Section 4311, which forbids discrimination against persons who volunteer or are called to service or training.